In the Supreme Court of the United States

OCTOBER TERM 1947

No. 56

SAMUEL S. WEISS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Rehearing

SAMUEL S. WEISS,
P. O. Box 127, Ambassador Station,
Los Angeles, California.
Petitioner in propria persona.

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Petition for a Rehearing

To Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Samuel S. Weiss, respectfully prays your Honors for a rehearing of this cause, submitting that in affirming the judgment of the Circuit Court of Appeals which affirmed the conviction of your petitioner and three

others in the District Court for the Northern District of California, this high court has misconceived the facts, has misapplied the law, and has condoned numerous and egregious errors committed by the trial judge.

It is submitted that there is an irreconcilable conflict between the opinion of Mr. Justice Rutledge in the case at bar and his earlier opinion on the same subject (the sufficiency of the evidence to establish a conspiracy) in *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L.ed. 1557.

More specifically the grounds now urged by your petitioner for a rehearing may be stated as follows:

GROUNDS UPON WHICH PETITIONER CONTENDS THAT A REHEARING SHOULD BE GRANTED.

1. That the opinion of this Honorable Court, in the face of *Kotteakos v. United States, supra*, has held the evidence sufficient to show the existence of a conspiracy, though there is not a shred of evidence of collusion, agreement, understanding or even acquaintance among the alleged conspirators;

2. That the Record, as far as petitioner Weiss is concerned, not only fails to show that he was a party to any conspiracy but, likewise, fails to show that he committed any offense whatever. The Record leaves him precisely where he was before the commencement of the trial and before the presentment of the indictment, presumed by law to be innocent of any crime or wrongdoing, with no evidence to dispel that presumption, indeed, without any evidence to even raise a reasonable suspicion of guilt;

3. That this Honorable Court by drawing, not upon the Record, but upon the imagination, and by the employment of its sheer *ipse dixit* and not otherwise, has evolved a new theory to uphold the conviction of this petitioner and his co-defendants, and has created a land of fanciful events and the fantasmagoria of a legalistic dream;

4. That the Opinion states as proved facts, matters neither shown by any direct testimony in the Record nor inferentially deducible therefrom. Indeed, the Opinion repeatedly states as facts, matters established by no evidence, either oral or documentary, and which have no existence save in the elastic imaginations of counsel for the Government;

5. That this Honorable Court has erroneously decided that, although the violation of a regulation of the sometime extinguished late and unlamented Administrator of the Office of Price Administration or an agreement (the equivalent of a conspiracy to violate such Regulation), is a mere misdemeanor under the express provisions of the Act itself, a conspiracy to violate one of the multitudinous Regulations adopted was a felony;

6. Aside from the question of the sufficiency of the evidence to show a conspiracy, this point is the only one decided in the Opinion of this Honorable Court.

Since, as stated in the second paragraph of the Opinion of Mr. Justice Rutledge, the grant of *Certiorari* was not limited to the question of the application of *Kotteakos v. United States, supra*, petitioner states as additional ground for a rehearing, that this Honorable Court has failed to

consider or discuss, and has not even mentioned the following questions raised in the brief of petitioner, each of which presents a question whose importance can scarcely be overstated:

(a) That the indictment does not charge any crime or conspiracy to commit any crime against the United States;

(b) That the Maximum Price Regulations which the indictment alleges the defendants conspired to violate, are void for uncertainty, and that the conviction of petitioner is, therefore, a violation of the provisions of the Fifth Amendment to the *Constitution of the United States* that no person shall be deprived of life, liberty or property without due process of law;

(c) That the District Court erred in denying the motion of petitioner for an instructed verdict of not guilty;

(d) That the District Court erred in denying the motion of petitioner Weiss in arrest of judgment;

(e) That the conviction of petitioner is a violation of Article I, section 9, Clause 3 of the Constitution of the United States, which provides: "That no bill of attainder or *ex post facto* law shall be passed".

(f) That the District Court erred in admitting against petitioner Weiss, testimony and documents relating to the other defendants without any proof whatever tending to connect Weiss with any of the transactions testified to by such witnesses, or with any conspiracy;

(g) That the Government failed to prove the maximum price for which the brand of whiskey mentioned

in the indictment might be sold and the Trial Judge committed reversible error in instructing the jury as to the maximum price;

(h) That the now defunct Emergency Price Control Act was unconstitutional and void, and that prior decisions upholding its unconstitutionality, such as *Yakas v. United States*, 321 U.S. 414, have been partly overruled by later decisions of this court, and should be overruled *in toto*.

We repeat, and most respectfully submit that there is no justification for the action of this Honorable Court in refusing to consider and decide the foregoing questions, all of which involve the liberty of citizens of the United States and as to each of which a decision adverse to the contention of petitioner strikes deep at the very roots of free and constitutional government.

ARGUMENT

I. THIS HONORABLE COURT HAS ERRONEOUSLY HELD THAT (1) THERE IS SUFFICIENT PROOF OF A CONSPIRACY; AND (2) THAT THE EVIDENCE ESTABLISHES THE CONNECTION OF PETITIONER WEISS WITH SUCH CONSPIRACY.

In the Briefs on file for this petitioner and three of his co-defendants; it was argued at very great length and with citation of many authorities including one decision written by the learned author of the Opinion in the case at bar (*Kotteakos v. United States*, *supra*), that the evidence in the Record showed at most that the appellants Blumenthal, Feigenbaum and Abel engaged in black market operations in that particular brand of whiskey men-

tioned in the indictment. There is not one iota of evidence in the Record that Blumenthal, Abel and Feigenbaum entered into any agreement with each other to sell the whiskey, that they ever subscribed to the *modus operandi* that was used in its sale or, indeed, that any of these three defendants know either of the other two or that any defendant knew that the other defendants were making sales of the whiskey for more than the alleged ceiling price of the same. We use the word "alleged" advisedly because as we shall presently point out there was no evidence in the Record that any ceiling price was ever fixed. As was well shown in the learned dissenting opinion of Judge Denman in the Circuit Court of Appeals referring to the opinion of the majority of the court and citing *Kotteakos v. United States, supra:*

> "The statement of facts of the court's opinion has a fatal vacuum necessary to be filled to establish the conspiracy charged, though its circumstantial evidence warrants the inference of at least four other disconnected criminal conspiracies.
>
> Abel, Blumenthal and Feigenbaum are shown to have been black marketeers and should have been prosecuted for selling whiskey at over ceiling prices. Instead, the several prosecutions are sought to be avoided by attempting to throw a conspiracy net around them—a convenience to prosecutors but often dangerous to the cause of justice. Cf. *Kotteakos v. United States,* 328 U.S. ....., 90 L.ed. 1178, 1183."

Referring to the appellants Weiss and Goldsmith, Judge Denman used the following language:

> "The same is true also of the appellants Weiss and Goldsmith. The conspiracy charged is that they

conspired with the three black marketeers, Abel, Blumenthal and Feigenbaum to sell whiskey at higher than the maximum price. The court's opinion states no facts and the record has none showing that either Weiss or Goldsmith knew that any whiskey was sold at such higher prices, much less than there was any agreement with the three or any one of them for such prohibited sales.

There is evidence that Weiss and Goldsmith received $2.00 per case to pass the whiskey through their books and to sell it at slightly less than the maximum price to cover up some unknown reason of the unknown owner. But this is fully capable of supporting an inference that the unknown owner has highjacked the whiskey and wanted it sold at something slightly less than the maximum so that no question could be raised regarding its disposition. True this would be a wrongful conspiracy, but as in the Kotteakos case, not the conspiracy charged in the instant indictment."

The opinion of Mr. Justice Rutledge contains no answer to the foregoing clear and unanswerable statements of Judge Denman.

All this, of course, was argued at length in the Briefs separately filed in the Circuit Court of Appeals by the five defendants and was also presented with quotation from the foregoing language of Judge Denman in the petition filed in this court for *Writ of Certiorari*.

Does the learned Justice, who wrote this opinion, attempt to distinguish it from his own well written Opinion in the *Kotteakos* case? Certain statements as to the sufficiency of the evidence are made in the Opinion. We shall briefly refer to each of them.

(a) In the second paragraph of the Opinion, it is stated: "The competent proof was clearly sufficient to show that each petitioner had aided in the whiskey's illegal sale **and had conspired with others to do so.**" This is a mere assumption of the hypothesis. It is no more than the *ipse dixit* of the learned Justice. It is the easiest way of disposing of a judicial question but is by no means the most satisfactory or the most convincing.

It is demonstrably true that the affirmation of the conviction of this petitioner is based solely upon evidence which was, concededly, inadmissible against any defendant except the one against whom it was admitted, because it consisted merely of some alleged declarations of petitioner Weiss and his co-defendant Goldsmith, after the fruition of the alleged conspiracy. Since one cannot conspire with himself alone, and since it is necessary to prove the unlawful agreement of two or more persons, it follows that any declaration of petitioner Weiss, incompetent to prove participation by anyone but himself, failed, therefore, to prove that two or more persons conspired.

But that is not the only vice of the Harkins' testimony, upon which the Opinion leans most heavily. No rule of law is better settled than the rule that the *corpus delicti* in a criminal case, which in a prosecution for conspiracy is the conspiracy itself, cannot be proven by the extra-judicial admissions, or even confessions of the accused without proof *aliunde* of the *corpus delicti*. It is elementary Horn Book Law—a principle apparently overlooked—by this Honorable Court, that the declarations of the accused are, of themselves, insufficient, to prove the body of the offense. To the point that the proof, in order

to sustain a conviction for conspiracy, must show participation of more than one person; see:

People v. MacMullen, 134 Cal. App. 81;
Dawson v. United States (C.C.A. 9th), 10 Fed.(2d) 106;
People v. Miller, 82 Cal. 107; 22 Pac. 934;
People v. Richards, 67 Cal. 412; 7 Pac. 828;
Merrill v. Marshall, 113 Ill. App. 447;
State v. Clark (Del.), 33 Atl. 310.

That the *corpus delicti* in a conspiracy case is the conspiracy itself, see:

Wyatt v. United States, 23 Fed.(2d) 791;
Langer v. United States, 76 Fed.(2d) 817;
Shannabarger v. United States, 99 Fed.(2d) 957;
Cartello v. United States, 92 Fed.(2d) 412;
Dahley v. United States, 50 Fed.(2d) 37.

In *Young v. United States*, 48 Fed.(2d) 26, a conviction of conspiracy was reversed because **there was no evidence** that the defendants "were acting in concert; for all that appears, each was acting only for himself." Unless and until it is established by the evidence that a conspiracy had been formed, and that the defendant was a member thereof, no act or declaration of an alleged co-conspirator is admissible in evidence against him. To use the language of the late Justice Richards in *People v. MacPhee*, 26 Cal. App. 218, 224; 146 Pac. 522:

> **"Such proof cannot consist merely in the acts and declarations of the alleged co-conspirators but must be in the nature of an independent showing as to the existence of the conspiracy."**

The Opinion of Mr. Justice Rutledge concedes that the evidence does not show that Blumenthal, Abel or Feigenbaum was connected in any way with the Francisco Distributing Co., and further concedes that up to the time that the Francisco Distributing Co. received from the tavern keepers, who purchased the whiskey, the sum of $24.50 per case "no illegal act, transaction, intent or agreement appears." The opinion then goes on to state that in addition to paying the Francisco the ceiling price of the whiskey, an additional sum was paid by the purchasers in cash to Blumenthal, Feigenbaum, Abel and several other "mysterious" salesmen. From these facts, this Honorable Court has drawn the inference or rather the assumption that the petitioner Weiss, who was nothing more than an employee of the Francisco and who attended to certain clerical routine matters relative to the drafts, invoices and bills of lading of the whiskey, knew that the three defendants who are grouped together in the Opinion as one of "two groups of defendants," were charging purchasers of the whiskey large sums in addition to the ceiling price which was remitted directly to the Francisco Distributing Company, the name under which the defendant Goldsmith transacted business.

Now, as we pointed out at great length, and with prolific quotation from the Record, in the briefs heretofore filed, there is no evidence whatever in the Record, and certainly the Opinion quotes none, from which any inference could be drawn that petitioner Weiss had any knowledge whatever that Abel, Blumenthal, Feigenbaum or any one else who sold the whiskey received any part of the additional amounts paid to Feigenbaum or Goldsmith or

Abel. It is apparent from the Opinion of the Circuit Court of Appeal and from the Record on file that the case was tried in the lower court upon the theory that, because the defendants who sold the whiskey to various proprietors of bar rooms or taverns or restaurants procured the whiskey from a common source and, because each of them charged more than the Regulation allowed, there was sufficient evidence to let all the testimony in and to receive all the documents produced as evidence against all of the defendants. To state the matter otherwise—the Government at the trial sought to have the jury draw the inference that a conspiracy existed because of the similarity of methods employed in making the sales of the whiskey. The fallacy of such a theory is easily demonstrable. Persons who violate unpopular inexpedient law usually adopt similar methods of violation or evasion. Numerous illustrations might be given. Landlords who are not allowed to charge as much as they thought that their accommodations were worth, resorted to such methods as requiring a prospective tenant to pay a bonus in order to get accommodations. Such instances were numerous as were many other devices, in evading price controls. Yet, would any lawyer who valued his reputation for sanity contend that the landlords of the country who used similar or identical methods of evading the controls on rent, could be rounded up from the four quarters of the compass and tried *en masse*? (*Paddock v. United States*, 79 Fed.(2d) 872.) Indeed, the absurdity of the theory under which the defendants were convicted in the lower court was so palpable that it is now abandoned by the Government, and the Opinion of Mr. Justice Rutledge has evolved a new theory

upon which to sustain the conviction, a theory which may thus briefly be stated: That the whiskey did not belong to the Francisco Distributing Company at all but actually belonged to Blumenthal, Abel, Feigenbaum and, perhaps, others, that the checks for the ceiling price were made out to the Francisco, to lend the transactions a coating of legality and that the distributing company was what Mr. Justice Rutledge described as a mere facade. This, we submit, is the achievement of literary elegance at the expense of factual and legal accuracy. There is not a word of evidence in the Record to substantiate any such theory. There is no testimony that either the checks made out to the Francisco nor any of the proceeds thereof were ever "kicked back," if we may use a homely phrase, to any of the defendants who sold the whiskey to the tavern keepers. Now follow two instances of utter inconsistency in the opinion of the court which we confess our inability to understand: after the statement just referred to which intimates that the Francisco and thus, we are told, Goldsmith and Weiss, were not the owners of the whiskey (see p. 8 of the Opinion) the court proceeds to promulgate the theory that some unknown person not named as a defendant in the indictment was the true owner of the liquor. According to this theory, Goldsmith, Weiss, Feigenbaum, Abel and Blumenthal were the mere media through which this unknown and unidentified person effected the sales—in other words, "X," the unknown quantity, owned the liquor but he cannot be discovered or identified by any formula, either legal or algebraic. We submit that this theory is based upon no evidence whatsoever, is the veriest conjecture and the sheerest guess work. There is not even

the hint of the existence of such a person in the Record, and the defendants, in effect, are accused of conspiring with a ghost!

Accordingly, it is not strange that the learned author of the Opinion shifts his position only a paragraph or so later. It is stated in footnote 13 at p. 13 of the printed Opinion:

> "The evidence as to the unknown owner no longer being in the picture, the inference is almost irresistible that Francisco was the owner. On arrival of the whiskey, title was taken in Francisco's name, in which the shipping documents were made out, sight drafts for the two carloads were paid at Goldsmith's direction from Francisco's bank account and the whiskey was stored and delivered by the Warehouse Company in accordance with Weiss' directions."

Thus, this Honorable Court, in order to sustain the conviction, has advanced three utterly inconsistent theories as to the ownership of the liquor:

First, that it was the property of Blumenthal, Abel, Feigenbaum and other persons, whose names are not set forth;

Second, that it was the property of the mysterious "X";

Third, that it was the property of the Francisco Distributing Company after all!

While we have the highest respect for this Honorable Court and the learned Justice who wrote the Opinion, we must confess to mental limitations that preclude us from following this reasoning. The truth is—and no other rational conclusion may be drawn from the Record—that the whiskey was the property of the Francisco Distributing Company, from which it was procured by the defendants,

Blumenthal, Abel and Feigenbaum, that the Francisco received no more than what the Government concedes was the legitimate ceiling price, and that any excess which was charged was charged by Blumenthal, Abel and Weiss, each acting independently of the Francisco, and of each other. Such evidence, obviously, does not sustain the theory of a conspiracy. See *Kotteakos v. United States, supra.*

II. THE PETITIONER WEISS STANDS IN THE RECORD AS AN INNOCENT PERSON IMPROPERLY INDICTED AND FALSELY ACCUSED.

The Honorable Justice who is the author of this Opinion has spoken of "two groups" of defendants. As a matter of fact, the defendants cannot be grouped. Blumenthal, Feigenbaum and Abel constitute a group only in the sense that they used like methods in disposing of the whiskey. Otherwise, each of them stands alone because of the utter dearth of evidence of any collusion or agreement between them or any knowledge on the part of any of them of the activities of the others. Goldsmith stands alone because his sole connection with the sales was that the whiskey belonged to him and he was paid for it in an amount under the alleged maximum price. Weiss not only stands alone, but any complicity or participation in any illegal activity is disproven by the record. As far as he is concerned, we have more than a case of failure of the Government to prove guilt; we have affirmative evidence of innocence. The indictment charged as one of the overt acts in furtherance of the conspiracy that Weiss made a sale of a quantity of the whiskey to one Figone. But, when Figone took the stand, there was a **debacle** of the

Government's case against Weiss, because Figone testified that Weiss did not make any sale of whiskey to him, that the man who sold to him was not Weiss. The same testimony was given by the witness Cermusco, who testified that he bought some whiskey from a man who gave his name as Weiss or Wise or "something," and further states, "I do not see the man that I saw then here in the courtroom. I have been here for a couple of days, since yesterday, and I have not seen him yet." Weiss at that time was seated at the counsel table, conducting his own defense.

It is obvious that the man who sold the liquor to these witnesses was not the defendant Weiss. That Weiss knew of any illegal activities of any of his co-defendants is not supported by even a shadow, much less by any substance, of proof. Indeed, even if Weiss had had knowledge of what some of his co-defendants were doing, the evidence would be insufficient to convict, because even knowledge of a conspiracy, without active participation therein, is insufficient.

Young v. United States, supra;
Tingle v. United States, supra;
State v. Naylor, 113 W.Va. 446; 168 S.E. 489;
Turcott v. United States, 21 Fed.(2d) 829;
Jianole v. United States, 299 Fed. 496;
Greenspahn v. United States, 298 Fed. 736;
Lucadamo v. United States, 280 Fed. 653.

In this connection, we respectfully call the attention of the court to certain language used by Mr. Justice Rutledge in the Opinion which is directly at variance with the views expressed by him in *Kotteakos v. United States, supra.*

At page 16 of the printed opinion, the learned justice says:

> "The law does not demand proof of so much. For it is most often true, especially in broad schemes calling for the aid of many persons, that after discovery of enough to show clearly the essence of the scheme and the identity of a number participating, the identity and the fact of participation of others remain undiscoverable. Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction."

Compare this with the following language used by Justice Rutledge in the *Kotteakos* case, 90 L.ed., at p. 1572:

> "We have not rested our decision particularly on the fact that the offense charged, and those proved, were conspiracies. That offense is perhaps not greatly different from others when the scheme charged is tight and the number involved small. But as it is broadened to include more and more, in varying degrees of attachment to the confederation, the possibilities for miscarriage of justice to particular individuals become greater and greater. Cf. Gebardi v. United States, 287 U.S. 112, 122, note 7, 77 L.ed. 206, 211, note 7, 53 S.Ct. 35, 84 A.L.R. 370, citing Report of the Attorney General (1925) 5, 6, setting out the recommendations of the Conference of Senior Circuit Judges with respect to conspiracy prosecutions. At the outskirts they are perhaps higher than in any other form of criminal trial our system affords. **The greater looseness generally allowed for specifying the offense and its details, for receiving proof, and generally in the conduct of the trial, become magnified**

as the numbers involved increase. Here, if anywhere, cf. *Bollenbach v. United States*, 326 U.S. 327; ante, 318, 66 S.Ct. 402, supra, **extraordinary precaution is required not only that instructions shall not mislead, but that they shall scrupulously safeguard each defendant individually,** as far as possible, from loss of identity in the mass. Indeed, the instructions often become, in such cases, his principal protection against unwarranted imputation of guilt from others' conduct. Here also it is of special importance that plain error be not too readily taken to be harmless."

We submit that it is to be regretted that the learned Justice in the instant case has departed from the salutary, just and humane rules pronounced by him in his earlier decision.

THIS HONORABLE COURT HAS FAILED TO PASS UPON QUESTIONS OF VAST IMPORTANCE RAISED BY PETITIONER.

These questions are stated at the commencement of this petition, and they deserve to be argued at length, but the rules which limit the time for a petition for a rehearing to 20 days are as strict as the fell sergeant in *Hamlet*, and at the date of this writing we have barely time for the printing of this petition and its transmission across the continent for filing.

We submit that the questions as to the sufficiency of the indictment, as to the constitutionality of the regulations therein mentioned, the *ex post facto* character of maximum price regulation 445, and the further question as to whether there was anything illegal in the charging of a bonus for the procuring of the liquor, are of sufficient importance, not only to petitioner but to others in similar

situations, to justify more than the cavalier treatment accorded them in the opinion of this Court.

WHEREFORE, your petitioner prays that a rehearing of this cause be granted and that upon such rehearing the judgment of the Circuit Court of Appeals should be reversed.

DATED: January 9, 1948.

SAMUEL S. WEISS,
Petitioner in propria persona.